



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 13, 1995

Mr. Robert E. Diaz  
Assistant City Attorney  
City of Arlington  
Box 231  
Arlington, Texas 76004-0231

OR95-1408

Dear Mr. Diaz:

On behalf of the City of Arlington (the "city"), you have requested that this office reconsider Open Records Letter No. 94-858 (1994). Your request for reconsideration was assigned ID# 31287. The initial request for information made to the city was for the disciplinary file leading to the requestor's termination. The city submitted as responsive to the request a letter of termination and several documents relating to sexual harassment complaints made against the requestor. The city claimed the requested information was excepted from required public disclosure as information made confidential by common-law privacy under section 552.101 of the Government Code. This office ruled that except for the information we marked as confidential under section 552.101 the requested information must be released.

You contend that our ruling in Open Records Letter No. 94-858 (1994) was contrary to the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) and claim that we direct release of items protected by the *Ellen* court as information made confidential by common-law privacy. For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information . . . is excepted from mandatory disclosure under [the statutory predecessor to section 552.101] as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. article 6252-17a, section 3(a)(1)). In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

As we stated in Open Records Letter No. 94-858 (1994), *Ellen* addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. Although the *Ellen* court determined that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment "were presumptively exempt from disclosure" under the privacy doctrine as described in *Industrial Foundation*, 840 S.W.2d at 525, the court did not conclude its examination at this point. The court acknowledged that the next question to be reached was "whether some legitimate public interest would be served by [the] disclosure" of the names of witnesses and their detailed affidavits regarding the allegations. *Id.* Crucial to the court's determination to withhold the names and individual statements was the fact that all the pertinent information regarding the sexual harassment charges was included in the affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation, both of which were public records. *Id.* The court stated that "[t]he individual affidavits of witnesses, given under threat of internal discipline, add nothing real to the public concern with this investigation." *Id.*

The records at issue in Open Records Letter No. 94-858 (1994), however, as far as we can tell by your correspondence with this office, are the *only* records detailing the allegations of sexual harassment. The clear public interest in such allegations made against a public employee demands that the records be released except as marked by this office in its initial ruling.<sup>1</sup> Open Records Decision No. 447 (1986) at 6 (common-law right of privacy does not protect the facts about a public employee's misconduct on the job). Furthermore, we fail to see, nor do you explain, how releasing the records as marked will reveal the identities of the witnesses or any other protected information. Therefore, the unprotected information is not inextricably intertwined with the protected information.

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<sup>1</sup>We note that the *Ellen* court acknowledges that the enforcement of prohibitions against sexual harassment may occasionally require the public release of "embarrassing" information although not in the case before it. 840 S.W.2d 526.

You also raise section 552.103 as excepting the requested information from public disclosure. A governmental body may not raise additional exceptions after the ten-day deadline, including a request for reconsideration, absent a showing of a compelling interest. Open Records Decision No. 515 (1988). The city did not raise section 552.103 in its initial request for a decision from this office. Moreover, an isolated telephone threat of litigation, without more, does not trigger section 552.103. Open Records Decision No. 452 (1986). Accordingly, our determination in Open Records Letter No. 94-858 (1994) stands. Except as initially marked by this office the requested records must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/LBC/rho

Ref.: ID# 31287  
Open Records Letter No. 94-858 (1994)

Enclosures: Marked documents

cc: Mr. Cesar DeLeon  
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(w/o enclosures)